United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To be argued by
RICHARD M. SHARFMAN

74-1915

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1915

HARRY S. SAMUELS,

Plaintiff-Appellant,

-against-

ARMSTRONG CORK COMPANY,

Defendant-Appellee.

Appeal from Part of a Judgment of the United States District Court for the Southern District of New York

PLAINTIFF-APPELLANT'S BRIEF

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III. STATEMENT OF THE CASE

This is an appeal from part of a judgment entered January 9, 1974, after a non-jury trial in the United States District Court, Southern District of New York, before Hon. Richard H. Levet. Judge Levet's decision, filed December 21, 1973, is not reported.

The action as tried consisted of two sets of claims, both arising from the activities of plaintiff-appellant Harry S. Samuels ("Mr. Samuels") on behalf of defendant-appellee Armstrong Cork Company ("Armstrong"). The first, with which this appeal is concerned, was for compensation under either a written contract or for quantum meruit for Mr. Samuels' efforts in connection with Armstrong's acquisition of Thomasville Furniture Industries, Inc. ("Thomasville"). The other, not here involved, was in respect of Mr. Samuels' services regarding the acquisition by Armstrong of B. T. Babbitt, Inc. ("Babbitt").

The action was originally commenced in New York Supreme Court, New York County on July 2, 1969, and was removed to the District Court by Armstrong. Trial was had on October 9, 10 and 11, 1973. After trial, the District Court dismissed the two counts of the complaint claiming damages in connection with the Thomasville acquisition and granted Mr. Samuels judgment in connection with the Babbitt acquisition. On February 7, 1974 Mr. Samuels filed a notice of appeal from that part of the judgment dismissing the claims arising from the Thomasville acquisition.

IV. STATEMENT OF FACTS

The Witnesses

The evidence adduced at trial related to events which occurred in the period from 1965 to 1968. Mr. Samuels testified in his own behalf and called two expert witnesses whose testimony is not involved in this appeal. Armstrong called five witnesses, all of whom were officers of Armstrong at the time of trial. They were:

Thomas A. Finch, Jr., who at all material times was president and director of Thomasville (203*) and at the time of trial was executive vice president and a director of Armstrong;

Max Banzhaf, who at all material times was a vice president of Armstrong, a member of its acquisition committee and a one-man sub-committee for furniture company acquisitions, and at the time of trial was a vice president and treasurer of Armstrong (273-275, 335, 450-451);

Frederick S. Donnelly, Jr., who at all material times was treasurer of Armstrong and a member of its acquisition committee and at the time of trial was a vice president and manager of Armstrong's international operations (334);

Maurice J. Warnock, who at all material times was president of Armstrong and at the time of trial was chairman of its board of directors (400); and

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* Reference to the Appendix are made by page number.

James H. Binns, who at all material times was senior vice president and a director of Armstrong and chairman of Armstrong's acquisition committee, and at the time of trial was its president (450).

Undisputed Facts

For the past 34 years Mr. Samuels, an attorney and member of the New York Bar (54), has been engaged in business as a principal, finder and broker in the acquisition of businesses. During that time he has had a part in effectuating 65 to 70 successful acquisitions (56).

In mid-summer of 1965, Armstrong, which was engaged in manufacturing floor, ceiling and packaging materials (274), formed an acquisition committee to study the possibility of acquiring other companies (275). On the recommendation of an officer of First National City Bank, who described Mr. Samuels as an acquisition expert (452, Exh. 24, at 615*) and recommended him highly (363), Mr. Donnelly invited Mr. Samuels to Armstrong's headquarters in Lancaster, Pennsylvania (335).

Mr. Samuels visited Lancaster on August 10, 1966 and met with the senior officers of Armstrong to discuss his assisting

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* References to exhibits admitted into evidence or marked for identification at trial are preceded by "Exh." Since the "plaintiff's exhibits", which are numbered, and the "defendant's exhibits", which are lettered, were not, in all cases, offered into evidence by the party who marked them, party designation (such as plaintiff's exhibit 1) is not indicated herein.

Armstrong to make acquisitions of companies in the furniture and other industries (64, 313-314, 336, 412). Thomasville, Kroehler and Mohasco Carpet Company were discussed and Mr. Samuels advised the Armstrong officers that, in his judgment, Thomasville and the two other companies were interested in being acquired (64-66). Mr. Samuels believed that Thomasville was interested because of his knowledge of discussions between Mr. Finch and Mr. Futurian, an officer of Mohasco Carpet Company, who was a mutual friend of Mr. Samuels and Mr. Finch, concerning the possibility of Mohasco Carpet Company acquiring Thomasville (81, 264).

Although Mr. Samuels said that he did not believe a written contract between Armstrong and him would be necessary, Armstrong insisted that there be one specifically defining their relationship (337). Mr. Samuels was asked to submit a proposed contract, which he did on August 12, 1966 (Exhs. 11, 11A, at 585, 586 respectively).

Mr. Samuels again met with officers of Armstrong in Lancaster on August 25, 1966 and on that day entered into a written contract (the "Contract") prepared by Armstrong's attorneys (71, 339, Exh. A,at 617) engaging Mr. Samuels to "act as a finder, broker or a negotiator for the submission of, or other action with reference to, proposals involving companies for possible acquisition by" Armstrong (Exh. A, at 617) (emphasis added). The Contract provides, inter alia:

> "2. No fee or other compensation shall be due and payable to you in any situation unless and until the transaction, based upon an acquisition found or negotiated by you, is actually closed or consummated....

"3. If and when you submit a proposition to us for consideration, we will, within fourteen (14) days after our receipt of such submission, inform you of our interest, if any, therein and of any further action, such as supplying additional information or negotiating, which we wish to have done with respect thereto.

"4. In the event you submit a possible acquisition which has theretofore been considered by us, even though no negotiations with respect thereto had taken place, and irrespective of the source thereof. . .we will advise you promptly of that fact and, thereafter, you will refrain from working on our behalf on that deal. In any such case, if at any time we consummate a transaction with reference to a company so involved, we will have no obligation to you for a fee or other compensation or expense reimbursement.

"5. In the event we become interested in a possible acquisition suggested by a source other than you, and we instruct you to explore and negotiate the same, we will, upon consummation of such a transaction, pay you two-thirds (2/3) of the fee set forth in the following paragraph 6....

"6. We will pay you as a fee a sum of money equal to three percent (3%) of the total consideration paid by us for an acquisition found and negotiated and consummated by you on our behalf. In the event the said consideration shall be capital stock of our Company, the amount thereof for the purpose of computing your fee shall be based upon the closing price thereof on the New York Stock Exchange on the date of closing the transaction. Said fee shall be payable to you within fifteen (15) days after the closing. We reserve the option to arrange for the seller in any such transaction to pay your fee in accordance with this agreement.

* * *

"8. If we consider a possible acquisition received from a source other than you, and, after instructing you to negotiate the same for us, we instruct you to terminate your activities in connection therewith, we will pay you two-thirds (2/3) of the fee provided in paragraph 6 if we consummate that acquisition within a period of twenty-four (24)

months after the date of our said instruction to you to terminate your activities. If the possible acquisition referred to in the preceding sentence is one originating from you, and the other conditions of that sentence are met, we will pay you the full fee provided in paragraph 6.

* * *

"10. Either of us may terminate this agreement at any time by giving the other at least thirty (30) days' written notice of intent to terminate. It goes without saying that we would not, in bad faith, exercise our right to terminate simply to avoid the payment of a fee to you in accordance with this agreement."

During the August 25, 1966 meeting, Thomasville, Mohasco Carpet Company (315) and Kroehler (76, 136) were again discussed as possible acquisition prospects (id.) and Mr. Samuels again stated that it was his judgment that Thomasville, as well as the other two, was available for acquisition. In addition, Mr. Samuels was asked by Mr. Donnelly, who was the officer designated by Armstrong to work with him (326), to review an acquisition proposal recommended by Mr. Banzhaf. On Mr. Samuels' advice, the acquisition recommended by Mr. Banzhaf was not made (314-315, 328, 369).

Thereafter, Mr. Samuels arranged a meeting with representatives of Kroehler and in late September or early October 1966, Mr. Donnelly, Mr. Banzhaf and he met with them in Chicago to discuss the possibility of Armstrong acquiring Kroehler (286-288). Following the meeting, Mr. Samuels, Mr. Donnelly and Mr. Banzhaf had dinner together and "compared the Kroehler possibility with Thomasville" (288). Within a week to ten days later, Mr. Samuels called Mr. Banzhaf and told him that Kroehler was

not interested in the Armstrong proposition (290).

Mr. Samuels had been introduced to Mr. Finch in 1965 by Mr. Futurian (56-60, 265). Beginning in September 1966, Mr. Samuels tried to reach Mr. Finch by telephone to arrange a meeting to discuss acquisition of Thomasville by Armstrong, but was unsuccessful (82-83). He did, however, leave messages with Mr. Finch's secretary, at least one of which, dated October 10, 1966, Mr. Finch retained (83, 260, Exh. 19 at 606-607). Additionally, Mr. Samuels gave Mr. Donnelly advice regarding Thomasville, including written advice on tactics to be considered for a meeting between Armstrong officers and Mr. Finch, which was arranged for October 18, 1966 by the Wachovia Bank and Trust Company of Winston-Salem, North Carolina (85-86, 349-350, Exh. 13, at 590).

Mr. Finch met with Armstrong officers on October 18, 1966 and discussed -- for the first time -- the possibility that Thomasville be acquired by Armstrong (259, 310-311). Mr. Finch told them that he would present the suggestion to his management and board of directors, but was not enthusiastic (218, 285).

On January 4, 5 and 6, 1967, at Armstrong's invitation, Mr. Finch and several other Thomasville executives visited Armstrong's headquarters in Lancaster (219). On Friday, January 6, 1967, just before Mr. Finch left Lancaster to travel to Chicago for a furniture show, he met privately with

Mr. Warnock. Mr. Finch expressed his interest in pursuing acquisition discussions, but stated that he did not care to deal with a finder or third party. Mr. Warnock told him that Armstrong had none (424). That Sunday, January 8, 1967, acting on Mr. Warnock's instructions, Mr. Donnelly advised Mr. Samuels by telephone that Armstrong was going to exercise its right to terminate the Contract (426). Under paragraph 10 of the Contract termination was effective thirty days after written notice.

Mr. Samuels met with Mr. Finch on or about January 10, 1967 in Chicago at the furniture show (89, 222) and discussed with him the possibility of an acquisition of Thomasville by Armstrong. Mr. Finch said he was not interested in having Thomasville acquired (90, 223). After his meeting with Mr. Samuels, Mr. Finch called Mr. Warnock, told him of his conversation with Mr. Samuels and expressed concern that Mr. Samuels was involved (224). Mr. Warnock told Mr. Finch that Mr. Samuels did not represent Armstrong in connection with Thomasville and that Mr. Samuels' relationship with Armstrong had in fact already been terminated (426).

By letter dated January 11, 1967 (Exh. 14, at 593), Mr. Donnelly wrote Mr. Samuels:

> "It was good to talk to you on Sunday [January 8, 1967] and to know that you share our feelings with regard to our letter of agreement dated August 25, 1966. Perhaps we would have saved the trouble had we followed your original recommendation in this regard. In any event we now feel that the agreement is not required, and you may, therefore, consider this letter formal

notice of termination as outlined in Paragraph 10 of the agreement.

"We also appreciate your offer to help us with the Pride negotiations if our interest reaches that point. It is entirely possible that we may call on you in this respect, but it will be several weeks at least before we will know how probable or improbable this deal looks.

"As I'm sure you understand, termination of our written agreement with you in no way suggests an intent or desire on our part to sever our relationship entirely. It simply means that to us it now seems to make more sense for us to work out our fee relationships on each individual proposal you bring us. This, of course, assumes that you will not divulge information to us until you are satisfied on this point, nor will we be responsible for any fees or expenses of any kind prior to our having reached an understanding on the particular matter at hand."

In June 1967, Mr. Samuels again approached Mr. Finch in Chicago at another furniture show and tried to persuade him to meet with Armstrong to discuss acquisition (99, 184-185). Mr. Finch again disclaimed any interest in a merger (99-100, 184-185).

The acquisition of Thomasville by Armstrong was announced July 2, 1968 (253) and was consummated November 1, 1968 (254). The purchase price amounted to $149,143,984 (489-490). On July 5, 1968, Mr. Samuels wrote to Armstrong requesting payment pursuant to the Contract in connection with the Thomasville acquisition (96-97, Exh. 16, at 597).

Mr. Samuels' Factual Contentions

Mr. Samuels testified at trial that the first time he met

anyone connected with Armstrong was at the August 10, 1966 meeting in Lancaster and that he brought up the subject of Thomasville as well as Kroehler and Mohasco Carpet Company as acquisition candidates. He also stated that he raised the subject again at his second meeting with Armstrong, on August 25, 1966 (64, 76, 129). Armstrong expressed interest on both occasions in the possibility of acquiring Thomasville (64-65, 78).

According to Mr. Samuels' testimony, at a subsequent meeting in Lancaster in September 1966, Mr. Donnelly told him that, as a result of Mr. Samuels having raised the prospect of acquiring Thomasville, Armstrong had made inquiries and had been informed that Thomasville was not available (81). Mr. Samuels assured Mr. Donnelly that it was, based on his knowledge of the Thomasville-Mohasco Carpet Company discussion (id.). Mr. Donnelly responded by instructing Mr. Samuels "to go right ahead and get . . . [Thomasville] for us" (82) and asked him to arrange a meeting between Armstrong and Thomasville (87). After that instruction, Mr. Samuels spoke many times with Mr. Donnelly about his efforts to contact Mr. Finch (82). Mr. Donnelly told Mr. Samuels of the upcoming October 18, 1966 meeting in Winston-Salem and asked Mr. Samuels to encourage Mr. Finch to attend that meeting (87), which Mr. Samuels attempted to do by calling Mr. Finch's office (87-88, Exh. 19, at 606-607).

Following the October 18, 1966 meeting, Mr. Donnelly continued to direct Mr. Samuels to pursue Mr. Finch (82-83, 147-148). Mr. Samuels told Mr. Donnelly that he would see Mr. Finch at the furniture show in Chicago during January (83). After meeting with Mr. Finch at the furniture show in January 1967, Mr. Samuels spoke with Mr. Donnelly by telephone and reported that Mr. Finch had expressed lack of interest (97-98).

At no time did anyone advise Mr. Samuels, or claim, that Armstrong had considered Thomasville for acquisition prior to his retention, and no one instructed him to stay away from Thomasville when he informed Armstrong's officers that Thomasville was available for acquisition (93, 127). Nor did Mr. Donnelly tell him either during their telephone conversation on January 8, 1967, or at any prior time, to stay away from Thomasville (91, 348).

Armstrong's Factual Contentions

Mr. Donnelly testified on October 10, 1973, that the first time he met Mr. Samuels was on August 10, 1966 in Lancaster (335). That day, Mr. Donnelly discussed generally Armstrong's interest in acquisitions and the possibility of Mr. Samuels helping, but did not himself discuss specific acquisition prospects with him (336). Mr. Donnelly claimed that he never asked Mr. Samuels to do anything in respect of Thomasville (348-349, 356), but testified that he never told

Mr. Samuels to stay away from Thomasville (348). He also stated that he spoke with Mr. Samuels on occasion regarding Armstrong's pursuit of Thomasville and that on several occasions Mr. Samuels gave him advice about Thomasville (349).

Mr. Banzhaf testified on October 10, 1973 that he first met Mr. Samuels on August 25, 1966 in Lancaster (275). Mr. Banzhaf recalled that no one at that time had instructed Mr. Samuels to stay away from Thomasville (316). He said that he had known "about the scope of . . . [Thomasville's] product line. . . . about their management. . . . how they were regarded in the industry" before he met Mr. Samuels (278). He also testified that before he met Mr. Samuels, he had met twice with Thomasville executives. The first time was in November 1965 when he met with the Thomasville officer in charge of manufacturing, "essentially picking his brains with respect to the furniture industry" (309-310). The next time was in January 1966, when he met Mr. Finch for the first time. Mr. Banzhaf acknowledged, however, that "there was no discussion of any merger or acquisition at that time" (310). As Mr. Finch had earlier recalled, "[w]e discussed if there were any materials that Armstrong made or might make that would be used by the furniture industry" (214).

Mr. Warnock testified on October 11, 1973, the date on which Mr. Samuels could not attend trial because it was a religious holiday, that he met with Mr. Samuels in late July

or early August 1966 together with Mr. Binns, to discuss Armstrong's and Mr. Samuels' methods of pursuing acquisitions (410,438). He claimed that at their meeting he named certain companies, including Thomasville (413), which he wanted "specifically excluded" from any contract between Armstrong and Mr. Samuels (439). Mr. Warnock acknowledged that he had seen both Mr. Samuels' draft contract (Exh. 11A, at 586) before Armstrong's legal department worked on it and the Contract (Exh. A, at 617) prepared by Armstrong's legal department, before Mr. Samuels signed it (439). Neither the draft nor the Contract excludes Thomasville or any other company.

During Mr. Warnock's testimony, four documents were admitted into evidence as business records of Armstrong supposedly to establish Armstrong's consideration of Thomasville as an acquisition candidate before Mr. Samuels' arrival. They were: a handwritten sheet headed "1964 Results" (Exh. K, at 659), a diagram with a handwritten note attached stating "Layout of Thomasville's Plant in Miss.-Furnished by Moore Dry Kiln Co. 3/7/66 in Jacksonville Fla." (Exh. L, at 661) and two handwritten documents, headed "Furniture Industry Fringe Survey, December-1965" (Exh. I and J, at 655 and 651 respectively).

Armstrong's last witness, Mr. Binns, also testified on October 11, 1963, in Mr. Samuels' absence. He stated that he first met Mr. Samuels on July 22, 1966 in Lancaster, where Mr. Donnelly introduced them (452). Mr. Binns had an expense

account showing that he charged a lunch that day with "Harry Samuels (Acquisition Specialist) to discuss various acquisition possibilities" (452, Exh. 24, at 615). He recalled that while he was alone with Mr. Samuels that day he "specifically told him that Henerdon [sic], Thomasville, Drexel were excluded from anything that he would help us on, that we already had things going in those particular areas" (453). Mr. Binns claimed to have met Mr. Samuels for the second time when Mr. Samuels came to Lancaster on August 10 (455) and not to have spoken to him since then (456).

V. ARGUMENT

Point 1

THE PART OF THE JUDGMENT APPEALED FROM MUST BE REVERSED BECAUSE IT IS BASED ON CLEARLY ERRONEOUS FINDINGS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW.

The opinion of the District Court states that Mr. Samuels' "allegation that he acted as a 'finder' in Armstrong's acquisition of Thomasville has been rejected. . .for basically two reasons" (704), both of which are demonstrably wrong. The two incorrect reasons specified by the District Court are:

> "First, the direct relationship certain of Armstrong's officers had developed with Finch over a period beginning in November 1965 makes it impossible for this court to believe that Armstrong would have requested an outsider to intercede with Finch. It should be pointed out in this regard that by the time of plaintiff's initial meeting with Armstrong, officers of that corporation had already met with officers of Thomasville on several occasions and had also made tentative studies of the feasibility of acquiring Thomasville.
>
> "Second, Samuels' behavior subsequent to signing the finder's agreement in August 1966 belies his contention that he interested Armstrong in Thomasville and pursued the matter at Armstrong's insistence. Samuels' own testimony indicates that he made only two telephone calls to Finch, one in late December 1966 and one in March 1967, and that he attempted to see him only twice, once in January 1967 and once in June 1967. These facts, taken in the context of the other evidence brought out at trial, fail to prove the actions of Samuels as being those of a man acting as a finder." (704-705) (emphasis added).

The District Court's first reason, as demonstrated at pages 17-27, below, has absolutely no support in any facts,

admissible or otherwise, and is contrary to the testimony of defendant's own witnesses. It is, therefore, clear that the reason is wrong and that the findings of fact upon which it is directly based are clearly erroneous. As shown at pages 28-40, below, taken as a whole, the findings of fact are infected by this basic misunderstanding and must also be rejected as clearly erroneous. Furthermore, the findings are nothing more than an adoption of Armstrong's proposed findings, -- and thus lack the necessary "insight of a disinterested mind" (United States v. El Paso Natural Gas Co., 376 U.S. 651, 656-657 (1964)) -- and are contrary to documentary evidence and the credible testimony.

As to the second reason, as demonstrated at pages 40-49, below, the District Court not only incorrectly recalled Mr. Samuels' testimony but ignored the contractual terms and uncontradicted facts which incontrovertibly establish that Mr. Samuels' expert judgment and advice regarding Thomasville's availability and the tactics for approaching Mr. Finch were precisely the contributions for which Armstrong retained Mr. Samuels and for which it agreed to pay him a fee.

A. THE DISTRICT COURT'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS BECAUSE:

1. THERE IS NO BASIS FOR THE DISTRICT COURT'S FACTUAL CONCLUSION THAT ARMSTRONG WOULD NOT HAVE "REQUESTED AN OUTSIDER TO INTERCEDE WITH FINCH".

The District Court's reasoning that a "direct relation-

ship" between Armstrong's officers and Finch had developed "over a period beginning in November 1965 . . .[which made] it impossible . . . for [the] court to believe that Armstrong would have requested an outsider to intercede with Finch" (704) must find its basis, if any were to exist, in the facts underlying Findings of Fact 10 and 11 (698-699). Finding of Fact 10 states:

> "Members of Armstrong's Acquisition Evaluation Committee met with officers of Thomasville on two separate occasions prior to Armstrong's first contact with Samuels on July 22, 1966. . . .
>
> "(a) The first meeting between Armstrong and Thomasville took place on or about November 23, 1965, when officers of both companies, including Banzhaf of Armstrong, met at the Thomasville plant in Thomasville, North Carolina. (247)
>
> "(b) The second meeting between officers of Armstrong (including Banzhaf) and Thomasville (including Finch) was on or about January 21, 1966. The discussion at this meeting centered around Armstrong's possible entry into the furniture industry as a supplier or manufacturer, through either acquisition or internal expansion. (247-248,278)"

Finding of Fact 11 states:

> "Prior to Armstrong's first meeting with Samuels on July 22, 1966 (see Finding 12), Armstrong had collected and considered data on several furniture companies, including Thomasville, with a view toward possible acquisition. (365-374; Exs. I, J, K, L at 655, 657, 659, 661, respectively)

Reference to the trial testimony and evidence establishes conclusively that Finding of Fact 10 is incorrect in its important respects, that Finding of Fact 11 is without support of any kind and that the first of the District Court's "two

reasons" for rejecting Mr. Samuels' claim is necessarily wrong.

There was no "direct relationship" between Armstrong and Mr. Finch or Thomasville and it is undisputed that, subsequent to Mr. Samuels' retention, Armstrong did ask an "outsider to intercede".

While there was testimony, as stated in Finding of Fact 10, that Mr. Banzhaf and several other executives of Armstrong met with officers of Thomasville on November 23, 1965 and January 21, 1966, both times being prior to Armstrong's first contact with Mr. Samuels, the record is clear, contrary to the District Court's conclusion, that neither meeting resulted in, or evidenced, any relationship between Mr. Finch and "certain of Armstrong's officers" (704) or had anything to do with the Thomasville acquisition. Instead, both meetings were part of Armstrong's effort to become a supplier of products to the furniture industry and to establish a vendor-purchaser relationship with Thomasville.

As to the November 23, 1965 meeting, Mr. Banzhaf testified that he met with the Thomasville officer in charge of manufacturing, "essentially picking his brains with respect to the industry" (308-309). Mr. Banzhaf testified that at that time there was no discussion of any acquisition or merger (308). Moreover, Mr. Finch was not even present (279).

On January 21, 1966, Mr. Banzhaf and two other Armstrong executives met Mr. Finch for the first time in a meeting

arranged by the High Point, North Carolina, Chamber of Commerce (186-187). Despite the District Court's Finding of Fact 10(b) that the "discussion at this meeting centered around Armstrong's possible entry into the furniture industry as a supplier or manufacturer, through either acquisition or internal expansion" (698), the trial transcript, including the pages cited in support of that finding, establishes that there was "no discussion of any merger or acquisition" during the meeting (310). Mr. Finch described the meeting as follows: "We discussed if there were any materials that Armstrong made or might make that would be used by the furniture industry. . .Mr. Banzhaf mentioned that Armstrong was considering entering the furniture business. We showed them our product line. We discussed some of the materials we were using in the product line" (214). The Armstrong executives said that they would "be in touch with us [Thomasville] and some of our people with regard to what [products] . . .might be of use. . .in serving the industry" (215).

Armstrong's next meeting with Mr. Finch, when Thomasville's acquisition was proposed, was on October 18, 1966, only two months after Mr. Samuels had been retained by Armstrong and had advised it that, in his judgment, Thomasville was available for acquisition. The meeting was arranged by the Wachovia Bank and Trust Company, which Mr. Donnelly had asked to intercede (375). As Mr. Finch testified, the bank's

president called and asked him if he "would come over before the Wachovia Board of Directors met and see and visit with people from Armstrong who were going to be with the bank on that particular day" (215-216).

Thus, contrary to the District Court's conclusion that a "direct relationship" had developed between "certain of Armstrong's officers" and Mr. Finch "over a period beginning in November 1965 [which] makes it impossible for this court to believe that Armstrong would have requested an outsider to intercede with Finch" (704), the facts are that Mr. Finch did not even meet anyone from Armstrong until January 1966, and no one at Armstrong had a sufficient relationship with Mr. Finch to arrange either that meeting or, more importantly, the meeting on October 18, 1966, two months after Mr. Samuels was retained and had told Armstrong of Thomasville's availability.

The unquestionable fact is that both the meeting in January, 1966, prior to Mr. Samuels' retention, and the October 18, 1966 meeting, subsequent to Armstrong's retention of Mr. Samuels, were arranged by "outsiders", the High Point Chamber of Commerce and the Wachovia Bank and Trust Company, which Armstrong asked to intercede with Mr. Finch.

There were no "studies of the feasibility of acquiring Thomasville" or consideration of "data on . . . Thomasville with a view toward possible acquisition", prior to Armstrong's first meeting with Mr. Samuels.

Examination of the trial transcript and exhibits convincingly establishes that there is no evidentiary support whatever for Finding of Fact 11 that:

> "Prior to Armstrong's first meeting with Samuels on July 22, 1966 . . . Armstrong had collected and considered data on several furniture companies, including Thomasville, with a view toward possible acquisition (400-409; Exhs. I, J, K, L, at 655, 657, 659, 661, respectively).

Pages 365-374 of the trial transcript (400-409) contain Mr. Warnock's efforts to authenticate Exhibits I, J, K and L as business records. These exhibits are handwritten, without any apparent identifying marks. At the trial, Mr. Samuels objected to the introduction of Exhibits I, J and L and moved to strike them on the ground that they could not be properly identified. The District Court ruled (695) that a sufficient foundation for their introduction had been laid, relying on Mr. Warnock's response of "Right" to the court's statement during direct examination: "I think there's evidence that . . . [Exhibits I, J and L] were kept in the regular course of business. Is that so?" (409). But review of Mr. Warnock's testimony on voir dire (406-409) regarding the exhibits demonstrates there was no proof which would permit their reception as evidence. Moreover, Mr. Warnock testified on cross examination that:

> "This Exhibit K came from our Armstrong staff, and that is all. The other three exhibits, I, J and K [sic], I can't swear that I know where they came from." (492).

And in response to the question "Do you know whether they came from the Armstrong files?", he answered, "I can't swear they came from the Armstrong files". (442-443).

It is impossible to fit this attempted foundation laying within the language of the Federal Business Records Statute, 28 U.S.C. 1732(a), which states in pertinent part:

> "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of such business to make such memorandum or record at such time of such act, transaction, occurrence, or event or within a reasonable time thereafter."

Here, Mr. Warnock had no personal knowledge that Exhibits I, J and L came from Armstrong's files, much less that they were made in the "regular course of any business", as the statute requires. Accordingly, the District Court erred in ruling they were admissible. United States v. Rosenstein, 474 F. 2d 705, 709-710 (2d Cir. 1973) (documents inadmissible as business records of a corporation where authenticating witness "not only did not keep the records, he did not even know from his own knowledge that they were kept" in office of corporation).

Moreover, even if Exhibits I, J and L had been properly admitted, on any reading they do not support Finding of Fact 11's

conclusion that Armstrong had "collected and considered data on . . . Thomasville, with a view toward possible acquisition" (698-699).

Exhibits I and J are two handwritten sheets of paper headed "Furniture Industry Hourly Fringe Survey, December-1965". The sheets contain information on various employee insurance, pension and other fringe benefits, such as "funeral pay" and "jury duty", apparently as reported by several furniture companies, including Thomasville, and several furniture industry trade associations. On their face, Exhibits I and J have nothing to do with an evaluation of Thomasville as an acquisition candidate.

Exhibit L appears to be a construction diagram prepared by a company called Fayette Enterprises, Inc. A note attached to it in handwriting says "Layout of Thomasville's Plant in Miss. - furnished by Moore Dry Kiln Co. 3/7/66 in Jacksonville Fla.". In the studied absence of explanatory testimony, to consider such a document evidence of consideration by Armstrong of Thomasville as an acquisition possibility is to strain credulity beyond the breaking point.

Whether Exhibits I, J and L are rejected as improperly admitted or as irrelevant on their face, the only possible support remaining for Finding of Fact 11 would be Exhibit K. That document does not support the finding; it is, on the contrary, powerful evidence that Armstrong had not considered Thomasville for acquisition prior to Mr. Samuels' retention.

Exhibit K is a handwritten document headed "1964 Results". It sets forth financial information for five furniture companies: Drexel, Thomasville, General Interiors, Kroehler and Hayward Wakefield. It does not contain any reference to the market price of any of the companies' stock or the ratio of the stock price to earnings - critical information in any acquisition analysis. The document proves no more than that someone at Armstrong was aware of well-known furniture companies.

What magic the District Court found in Thomasville's inclusion in Exhibit K is unfathomable, especially since Kroehler too is listed. If Exhibit K were actually a study of the several furniture companies for possible acquisition, as the District Court found, then Armstrong would have warned Mr. Samuels away from all the companies listed, including Kroehler. Both Mr. Banzhaf and Mr. Donnelly admitted that Mr. Samuels submitted Kroehler and arranged and attended a meeting with them at Kroehler to discuss its acquisition by Armstrong (286-287, 345).

The inadequacy of Exhibits I, J, K and L as evidence that Armstrong considered Thomasville for acquisition is further highlighted by a comparison with Exhibit E for Identification, a seven page, typed document headed "Mr. Tom A. Finch SCHEDULE OF VISIT TO THE ARMSTRONG CORK COMPANY, January 4, 5 and 6, 1967". The formality and detail of this document prepared after Mr. Samuels' retention and after he had advised Armstrong

of Thomasville's availability, are in stark contrast to the unfocused, haphazard informality of Exhibits I, J, K and L, which were found to prove that Armstrong had considered Thomasville for acquisition before Mr. Samuels was retained. Nor were any minutes of the acquisition committee or other memoranda concerning the committee's activities introduced by Armstrong at the trial, although formal minutes were kept, as established by Mr. Banzhaf's deposition testimony (Supp. 59-60).* Armstrong's failure to offer such evidence requires the inference that, contrary to its contention, it had not reviewed the possibility of acquiring Thomasville prior to the retention of Mr. Samuels. Richardson On Evidence, §92, at 67 (10th ed. 1973).

In Orvis v. Higgins, 180 F. 2d 537 (2d Cir.), cert. denied, 340 U.S. 810 (1950), this Court reviewed, in light of United States v. United States Gypsum Co., 333 U.S. 364, rehearing denied, 333 U.S. 869 (1948), the permissible extent of appellate review of findings of fact under Fed. R. Civ. P. 52(a). In Gypsum, the Supreme Court had overturned findings based on testimony which conflicted with documentary evidence and observed that:

> ". . .A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. at 395.

Writing for this Court in Orvis, Judge Frank laid down the

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*References to the Supplemental Appendix are made by page number preceded by "Supp.".

following rule:

> "In the light of the Gypsum case, we may make approximate gradations as follows: . . . Where a trial judge sits without a jury, the rule varies with the character of the evidence: (a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding. (b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful [as in Gypsum], or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance. (c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances." 180 F. 2d at 539-540.

Applying those standards here, the "definite and firm conviction that a mistake has been committed" (United States v. United States Gypsum Co., supra) is unavoidable. Not only is it an undisputed fact that Armstrong did ask outsiders to intercede with Mr. Finch, contrary to the District Court's misunderstanding (704), but also there is no documentary evidence or credible testimony to support the court's findings that, prior to the retention of Mr. Samuels, Armstrong had considered Thomasville for acquisition or that Armstrong had discussed acquisition with Thomasville. Thus, there is no factual foundation whatsoever for either those findings or the District Court's factual conclusion.

2. THE FINDINGS OF FACT CRUCIAL TO THE DISTRICT COURT'S DECISION ARE EXPRESSLY BASED ON ITS ERRONEOUS FACTUAL CONCLUSION AND ARE INCOMPATIBLE WITH DOCUMENTARY EVIDENCE AND THE CREDIBLE TESTIMONY.

The District Court's refusal "to believe that Armstrong would have requested an outsider to intercede with Finch" (704) flies in the face of the fact that Armstrong obviously had a need to, and in fact did, ask the intercession of outsiders. And by its own statement, the District Court was led by its erroneous disbelief to misconstrue Exhibit K and the erroneously admitted Exhibits I, J and L, as evidence of otherwise unrecorded and not testified to "tentative studies of the feasibility of acquiring Thomasville" (704). Accordingly, as demonstrated above, Findings of Fact 10(b) and 11 are clearly erroneous.

But the impact of the District Court's error does not end there. It infects all the findings basic to the court's determination that Mr. Samuels was not entitled to compensation. Given the nature of the case and the enormity of the error, all the critical findings necessarily flowed from the District Court's misunderstanding, as it could not possibly have properly evaluated either the credibility of the witnesses or the weight of the evidence before it.

The conclusion is reinforced because the District Court's important findings are obviously tracked from Armstrong's

proposed findings with little change in form and no change in substance, even to the extent that an incorrect citation to a non-existent page of the trial transcript is made. Thus, not only were the District Court's findings of fact conceived in error, they were formulated without the "personal analysis" to which a litigant in a non-jury trial is entitled. Louis Dreyfus & Cie. v. Panama Canal Co., 298 F. 2d 733 (5th Cir. 1962). While findings so formulated are not automatically to be rejected, "that is not to say that courts will not make the most searching examination for error in such cases". In re Las Colinas, Inc., 426 F. 2d 1005, 1010 (1st Cir. 1970), cert. denied sub nom. Banco Popular de Puerto Rico v. Las Colinas, Inc., 405 U.S. 1067 (1972). Cf. Tanker Hygrade No. 24, Inc. v. The Dynamic, 213 F. 2d 453, 456 (2d Cir. 1954).

Examination of the District Court's findings of fact establishes that, in addition to having resulted from its basic error and having been strongly influenced by Armstrong's proposed findings of fact, they are contrary to substantial testimony and evidence. For the foregoing reasons, they must be overturned.

The Pivotal Findings of Fact

The District Court's rejection of Mr. Samuels' claim for compensation turned on the erroneous finding (as

discussed at pages 22-27, above) that Armstrong had previously studied Thomasville as an acquisition candidate, and that:

1) "[d]uring the term of the contract" Mr. Samuels "submitted many companies" but "Thomasville was not one of the companies submitted" (Finding of Fact 25; 702);

2) at Mr. Binns' first meeting with Mr. Samuels, on or about July 22, 1966, he "specifically told. . . [Mr. Samuels] not to approach Thomasville since Armstrong was already interested in that company as a possible acquisition and would follow through on the matter itself" (Finding of Fact 12; 699);

3) "Armstrong never asked Samuels to take any part whatsoever in furtherance of Armstrong's pursuit of Thomasville" (Finding of Fact 26; 702);

and

4) Armstrong terminated its contract with Mr. Samuels "in good faith" (Finding of Fact 16; 700).

None of those findings can withstand analysis. Moreover, as demonstrated at pages 40-47 below, the court failed to consider the ultimate factual question -- whether Mr. Samuels' advice to Armstrong that Thomasville was interested in being acquired led to the acquisition -- which on the undisputed facts here must be answered affirmatively.

The finding that Mr. Samuels did not submit Thomasville is not supported by the documentary evidence relied upon by the District Court and is contrary to the credible testimony.

Finding of Fact 25, that Mr. Samuels submitted many companies to Armstrong but did not submit Thomasville (702) (a virtual copy of Armstrong's proposed finding of fact 23 (681)) purports to be based upon Exhibit D, a collection of letters from Mr. Samuels to Armstrong, upon the testimony of Mr. Samuels identifying the letters, and upon the testimony of Messrs. Donnelly and Binns.

Exhibit D consists of a group of letters sent by Mr. Samuels' office to Armstrong (137-139), proposing various acquisition candidates. Since Thomasville is among the companies referred to, the exhibit can hardly be support for the finding. The reference to Thomasville is in a handwritten postscript to Mr. Samuels' October 10, 1966 letter to Mr. Banzhaf, which, in addition to being one of the letters included in Exhibit D, was separately marked as Exhibit 13.

Even if Thomasville were not referred to in Exhibit D, the District Court's inference that the absence of a written submission was evidence that Thomasville had not been submitted would be unfounded, since it is undisputed that Mr. Samuels submitted Kroehler for consideration and Kroehler is not referred to among the letters comprising Exhibit D.

As to Mr. Donnelly's testimony, examination of the transcript pages relied upon by the District Court in Finding of Fact 25 (332a, 348) shows, initially, that there is no transcript page 332a. The only other place that this erroneous

pagination appears is in Armstrong's proposed finding of fact 23 (681). Mr. Donnelly did say (365-366) that it was his "recollection" that Mr. Warnock, Mr. Binns or Mr. Painter of Armstrong told Mr. Samuels at the August 10, 1966 meeting in Lancaster that he should stay away from Thomasville. But his prior testimony on examination before trial, which was read at the trial (367), about that meeting was an even less definite, "I think it is probable that we mentioned Thomasville. I have no recollection of . . . [Mr. Samuels] mentioning Thomasville".

The testimony by Mr. Binns (468), relied upon by the District Court, that he, not Mr. Samuels, had first brought up Thomasville and that the occasion was a meeting on July 22, 1966, in Lancaster, must not only be weighed against Mr. Samuels' contrary testimony (61) but also against Mr. Binns' other, unbelievable testimony, discussed hereafter, and the obvious (although not evidentiary*) facts that there could not possibly have been a July 22, 1966, meeting between

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* A reading of Exhibits for identification 22 and 23, as to which Mr. Binns was questioned (469-471) but which were neither identified nor offered at trial, confirms that Mr. Samuels could not have met with Mr. Binns on July 22, 1966. Both exhibits were identified by Mr. Donnelly during his deposition on November 23, 1971, at pages 7 and 9 (Supp. 105-107). As shown by Exhibit 23 for identification, which is Mr. Donnelly's July 27, 1966 memorandum to the file, Mr. Donnelly, who was responsible for introducing Mr. Samuels to Armstrong (363) and who Mr. Binns testified had introduced Mr. Samuels to him (452), had not even met Mr. Samuels on July 22, 1966.

Mr. Binns and Mr. Samuels and that Exhibit 24, Mr. Binns' expense account record showing a charge that day for lunch with Mr. Samuels is, to say the least, inaccurate.

Mr. Samuels testified that he never met Mr. Binns on July 22, 1966 (61, 127) and that it was he who first raised the name of Thomasville, together with Kroehler and Mohasco Carpet Company, at his first meeting with Armstrong on August 10, 1966, at which time it was received with interest and without any direction to stay away from Thomasville (64-65).

Thus, the validity of the finding turns on the credibility of Messrs. Donnelly and Binns on the one hand and Mr. Samuels on the other. Because of the reference in Exhibit 13 (also in Exhibit D) to Thomasville, the undisputed fact that Mr. Samuels did submit the other two companies at the same time that he says he suggested Thomasville, and the total absence of any evidence that Armstrong had focused on Thomasville prior to Mr. Samuels' retention, the situation, as demonstrated immediately hereafter, is one in which, to borrow Judge Frank's words, "the written evidence or some undisputed fact renders the credibility of the oral testimony [of the Armstrong witnesses] extremely doubtful". Orvis v. Higgins, supra at 539. Regardless, here the District Court's basic misconception -- that it was impossible to believe that Armstrong needed an outsider to intercede with Mr. Finch -- must necessarily have prejudiced it unfairly against Mr. Samuels' credibility and therefore

disqualified the District Court as a judge of credibility. Finding of Fact 25 must, therefore, be overturned in any event.

The finding that, prior to entering into the Contract, Armstrong instructed Mr. Samuels not to approach Thomasville, is not supported by documentary evidence or credible testimony.

The finding that Mr. Samuels and Armstrong "had their first contact" at a meeting "on or about July 22, 1966" at which Mr. Binns "specifically told plaintiff not to approach Thomasville", which is Finding of Fact 12 (699) and a substantially identical paragraph 9 of Armstrong's proposed findings (677), purports to be based on testimony by Messrs. Donnelly, Warnock and Binns. Since Mr. Samuels had been sought out and hired as an acquisition expert, and since there is an absolute failure of any proof that Armstrong had considered Thomasville as an acquisition candidate or had any prior direct relationship with Mr. Finch, it is beyond credibility that Armstrong would have, in good faith, instructed Mr. Samuels to stay away from Thomasville.

Mr. Binns' testimony that, on July 22, 1966, he told Mr. Samuels that Thomasville and two other companies were "excluded from anything that he could help us on, that we already had things going in those particular areas" (453) can hardly be credited. Although Armstrong's case consumes 267 pages of the trial transcript, there is not one line of testimony or

one document evidencing that Armstrong had "things going" with Thomasville.

And if Mr. Binns in fact told Mr. Samuels at the supposed July 22, 1967, meeting that there would have to be a written contract between Armstrong and Mr. Samuels since "we are a little leary [sic] of 'finders' because we have been active in these fields and we wouldn't want to get involved if you are claiming something that really we had already been working on" (455), the absence of any reference to Thomasville in the Contract between Armstrong and Mr. Samuels is impossible to explain.

Mr. Warnock's testimony at pages 377-378 and 410 of the trial transcript (412-413 and 445) also is incredible in light of documentary evidence and other testimony by him. Mr. Warnock claims that at the first meeting with Mr. Samuels (410), both he and Mr. Binns told Mr. Samuels that there were a number of companies with which they would not want his help, including Thomasville and "the McGee Carpet Company or the Maslin Carpet Company or the E. and B. Carpet Company" (413). It was then that Mr. Warnock claims he "specifically" stated to Mr. Samuels "[y]ou must include in . . . [the Contract] a paragraph about these exclusions that I have talked to you about" (413-414). Although Mr. Warnock testified that he saw both Mr. Samuels' draft of the contract and the final contract prepared by Armstrong's legal department before it was signed (439), neither of those

documents contains "a paragraph about these exclusions that I have talked to you about" (414), despite his supposed insistence that they do so.

Additionally, Mr. Samuels subsequently submitted both McGee Carpet Company and Maslin Carpet Company for consideration by Armstrong, and neither was rejected. Both are among the companies included in Exhibit D, where they are named in an October 21, 1966 letter from Mr. Samuels to Mr. Donnelly which lists a total of 32 companies. ("Maslin Carpet Company" appears in the list under its correct name "Masland Carpet Company"). The typewritten document bears the handwritten notation "no" next to seven of the companies listed, but not next to either McGee Carpet Company or Masland Carpet Company.

Mr. Donnelly's testimony, at pages 324 and 332 of the transcript (357 and 365), to the effect that someone told Mr. Samuels at the August 10 meeting that he should stay away from Thomasville, is not only indefinite and contrary to common sense, but otherwise insufficient, considering his far more attenuated recollection when deposed (172-173).

<u>The finding that Armstrong did not ask for Mr. Samuels' help in acquiring Thomasville is contrary to the credible testimony.</u>

Finding of Fact 26 (702), which is a combination of paragraphs 25 and 26 of Armstrong's proposed findings (681-683), to the effect that Armstrong never asked Mr. Samuels "to take

any part whatsoever in furtherance of Armstrong's pursuit of Thomasville" is, of course, contrary to Mr. Samuels' testimony that Mr. Donnelly expressly directed him to do so (82), which both Armstrong's proposed findings and the District Court's Finding of Fact rejected, even though it was undisputed that Mr. Samuels did advise Mr. Donnelly, orally and in writing, on a number of occasions regarding tactics for the acquisition of Thomasville (83, 85-86, 349-350, Exh. 13, at 590) and made efforts to, and did meet with, Mr. Finch (82-83, 89, 99, 184-185, 222). For the same reasons that make it impossible to believe that Armstrong would, in good faith, have instructed the acquisition expert they were about to hire to stay away from a company they had not previously "considered" to be an acquisition candidate, it is impossible to believe that Armstrong would not have asked for Mr. Samuels' aid in pursuing such a company after he was retained for the express purpose of rendering assistance in such situations. That conclusion is reinforced by the undisputed fact that Armstrong sought Mr. Samuels' advice on a proposed acquisition that actually was, on Mr. Banzhaf's recommendation, under active consideration (314) and that, based on Mr. Samuels' judgment, Armstrong abandoned it (314-315, 328, 369).

The finding that the Contract was terminated "in good faith" is contrary to documentary evidence and undisputed facts.

Finding of Fact 16 (700), which is an abridged paraphrasing of paragraph 14 of Armstrong's proposed findings

(678), states that the Contract "was terminated in good faith. . . upon the expiration of thirty days following written notice given by Armstrong dated January 11, 1967". Like the other material findings of fact, it cannot withstand scrutiny. Indeed, the statements contained in the January 11, 1967, termination letter (Exhibit 14) are in marked contrast to the testimony by Mr. Warnock on the subject, despite the fact that the District Court relies on both to support the finding.

Mr. Warnock testified that Messrs. Banzhaf, Binns, Donnelly and he "reviewed Samuels' work with us and concluded that we were not getting anyplace, and that we, in fairness to him and ourselves, should terminate the relationship" (448). According to Mr. Donnelly, he spoke with Mr. Samuels on Sunday, January 8, 1967, at which time, in accordance with that decision, he informed Mr. Samuels that Armstrong was electing to terminate the Contract (426).

But Exhibit 14 does not reflect any decision by Armstrong that it was "not getting anyplace" with Mr. Samuels or that Armstrong "in fairness to him and ourselves, should terminate the relationship", as Mr. Warnock testified. Quite the opposite, Mr. Donnelly wrote to Mr. Samuels in that letter:

> "As I'm sure you understand, the termination of our written agreement with you in no way suggests an intent or desire on our part to sever our relationship entirely. It simply means that to us it now seems to make more sense for us to work out our fee relationships on each individual proposal you bring us."

In the circumstances of this case, there is but one explanation for the divergence between the testimony of Messrs. Warnock and Donnelly and the wording of Exhibit 14. On January 6, 1967, just two days prior to the date on which Mr. Donnelly recalled speaking with Mr. Samuels on the telephone and informing him that Armstrong was going to terminate, Mr. Finch had concluded his visit to Armstrong's Lancaster headquarters by telling Mr. Warnock that he was interested in pursuing acquisition discussions but that he was concerned about the possibility a finder might be involved. Mr. Warnock assured him that none was (426, 445).

The inference is irrefutable that following Mr. Finch's remarks, Messrs. Warnock, Banzhaf, Binns and Donnelly decided to jettison Mr. Samuels, not because the relationship with him was not fruitful, but because of their concern that Mr. Finch would be disturbed by Mr. Samuels' involvement if they did not.

Both Mr. Donnelly and Mr. Warnock testified that the January 11, 1967 termination letter was sent prior to Mr. Finch's telephone call to Mr. Warnock regarding his meeting with Mr. Samuels at the Chicago furniture show. According to Mr. Warnock, after speaking with Mr. Finch, he gave directions for Mr. Donnelly to contact Mr. Samuels and inform him that he was to stay away from Thomasville (427). According to Mr. Donnelly, he called Mr. Samuels and so instructed him (357). If that were true, it would, to say the least, be perplexing that a matter of

such obvious importance was left to a telephone call rather than a letter, especially since Mr. Donnelly's instructions to Mr. Samuels on January 4, 1967, that he was not to deal with another company, were in writing (Exh. 15, at 595).

On the other hand, if Mr. Finch's phone call to Mr. Warnock about Mr. Samuels approaching him in Chicago, and Mr. Warnock's instructions to Mr. Donnelly to direct Mr. Samuels to stay away from Thomasville occurred before the termination letter, it is equally incredible that there would be no reference at all to Thomasville in that document, unless the absence is attributed to the fear that instructing Mr. Samuels to stay away from Thomasville would alert him to Armstrong's bad faith in terminating him.

Regardless of whether the phone call from Mr. Finch preceded or followed the January 11, 1967 letter, it is, however, clear that the termination could hardly have been in "good faith" since it undoubtedly resulted from Armstrong's concern that the very real prospect of acquiring Thomasville would be jeopardized by the involvement of the man who had made it possible in the first place, Mr. Samuels

B. THE DISTRICT COURT'S CONCLUSIONS OF LAW ARE ERRONEOUS BECAUSE:

1. THE UNDISPUTED FACTS ESTABLISH THAT MR. SAMUELS IS ENTITLED TO COMPENSATION UNDER THE CONTRACT

The District Court concluded that Mr. Samuels was "not entitled to recover any compensation for the Thomasville

acquisition" (706) because he "failed to prove by a fair preponderance of the credible evidence that he 'found and negotiated and consummated' Armstrong's acquisition of Thomasville as required by the contract" (705).

The District Court reasoned that Mr. Samuels' actions subsequent to signing the Contract were not those of a man "acting as a finder" because, as it incorrectly recalled his testimony, "he made only two telephone calls to Finch, one in late December 1966 and one in March 1967, and. . . he attempted to see him only twice, once in January 1967 and once in June 1967" (704-705). Mr. Samuels testified, however, that he made numerous efforts to reach Mr. Finch by telephone during the period from September 1966 through the end of the year and that he left messages with Mr. Finch's secretary (83, 189). His testimony is corroborated by Exhibit 19, the telephone message memorandum from Mr. Finch's office recording a call on October 10, 1966 by Mr. Samuels to Mr. Finch. Also, Mr. Samuels did not testify that he merely attempted to see Mr. Finch in January and June 1967. He testified that he actually did see Mr. Finch on those occasions (89, 99).

More importantly, in addition to incorrectly recalling Mr. Samuels' testimony about his efforts to speak with Mr. Finch, the District Court totally ignored the undisputed facts which demonstrate that Mr. Samuels' activities were precisely those contemplated by the Contract.

There is no dispute that Mr. Samuels is a highly skilled, professional finder and business broker with extensive experience in successful acquisitions (54-57). It is undisputed that Armstrong sought him out because he had been "very highly" (363) recommended as an "acquisition expert" (452, Exh. 24, at 615) and that it engaged him to "act as a finder, broker or a negotiator for the submission of, or other action with reference to, proposals involving companies for possible acquisition" (Exh. A). Nor is there any denial of Mr. Samuels' testimony that at both the August 10 and August 25, 1966 meetings with Armstrong's officers he informed them that Thomasville was available for acquisition and that, on numerous occasions thereafter, he advised Mr. Donnelly regarding efforts to acquire Thomasville. Moreover, Mr. Samuels testified that in September 1966, Mr. Donnelly asked him if he was certain that Thomasville was available because Armstrong had made inquiries as a result of Mr. Samuels' prior statements and had been told that it was not. Mr. Samuels again assured him that it was (81-82).

Mr. Samuels' judgment of Thomasville's availability was based, as he testified, on his knowledge of discussions between Mr. Futurian, an officer of Mohasco Carpet Company, and Mr. Finch about the possibility of that company's acquiring Thomasville (81-82), a discussion which Mr. Finch confirmed (264). While it may be true that Mr. Finch told Mr. Futurian that he was not interested in being acquired by Mohasco Carpet

Company, it is also true that Mr. Samuels' expert judgment that Thomasville was available, in spite of Mr. Finch's expression of disinterest, was borne out not only by Armstrong's ultimate acquisition but also by the fact that Mr. Finch and several of Thomasville's executives traveled to Lancaster on January 4, 1967 to discuss acquisition.

Like his expert judgment regarding Thomasville's availability for acquisition, Mr. Samuels' advice concerning tactics for its pursuit was also demonstrated to be accurate. In the postscript to his October 10, 1966 letter (Exh. 13, at 590), Mr. Samuels advised of the dangers of involving the Wachovia Bank and Trust Company in its discussions with Mr. Finch because "[i]t has been my experience that executives of his type don't tell their fathers, wives, or sons of their plans". That Mr. Samuels' advice was accurate is confirmed by Mr. Finch's expression of disinterest at the conclusion of the October 18, 1966 meeting, which the bank had arranged, and his statement of concern to Mr. Warnock on January 6, 1967 about the involvement of third parties in discussions between Armstrong and Thomasville. It was immediately after that that Mr. Samuels was terminated.

It was precisely in order to obtain the benefit of such judgment and advice that Armstrong retained Mr. Samuels, as shown by a reading of the language of the Contract empowering Mr. Samuels to act as a "finder, broker or a negotiator for the submission of, or other action with reference to, proposals

involving companies for possible acquisition" (Exh. A, at 617) (emphasis added).

Even absent such express contractual language, in New York the law is settled that a finder is entitled to compensation "if a transaction ultimately entered upon is a direct result of the disclosure [by him] of the opportunity". Simon v. Electrospace Corp., 32 A.D. 2d 62, 66 (1st Dept. 1969), modified (on the issue of damages), 28 N.Y. 2d 136 (1971).

Seckendorff v. Halsey, Stuart & Co., 234 App. Div. 61 (1st Dept. 1931), rev'd on other grounds, 259 N.Y. 353 (1932), is compelling authority for Mr. Samuels' entitlement to compensation in respect of the Thomasville acquisition. There the plaintiff had been asked to help obtain financing for the purchase of certain real property. He approached one of the defendants with the proposition. That defendant provided the plaintiff with a letter stating that, "together with such associates as we may select", it was "interested in considering the proposed financing" and would, "in the event of our financing the same", pay the plaintiff a fee. 234 App. Div. at 64. The defendant attempted to interest others in raising the necessary capital but was unable to do so. Thereafter, the purchase of some of the properties was effected through a financing in which the defendant participated, although the

purchaser was not the person who had asked the plaintiff for help in finding financing. In affirming a judgment on a jury verdict for the plaintiff, the court observed:

> "It is urged on the part of appellant [one of the associates] that this deal which was carried through was entirely separate, distinct and different from the deal and set-up contemplated at the time plaintiff took up the matter originally with . . . [the defendant's representative]. It seems to us that that is a matter of no materiality whatever. Plaintiff was in nowise a broker.... He merely was a finder of this piece of business. He was to receive his compensation for finding the business and bringing the same to the attention of. . . [the defendant] and its associates. He claimed his compensation solely upon the ground that he was the originator of the business and had disclosed to. . . [the defendant] and its associates the opportunity to engage in this financing. Except for the fact that plaintiff himself had discovered this opportunity there never would have been any bond issue with reference to the Wardman properties. Plaintiff himself was alone responsible for finding this business and discovering it to defendants. The details of the financing or the properties included, so long as they were so-called Wardman properties, were of no concern to plaintiff. <u>All that plaintiff was bound to show was that the final deal which was carried through flowed directly from his introduction of the matters to . . . [the defendant]...."</u> 234 App. Div. at 70-71 (emphasis added).

In this case, it is abundantly clear that Armstrong's acquisition of Thomasville was "a direct result of the disclosure" of its availability (<u>Simon v. Electrospace Corp., supra</u>) by Mr. Samuels, without which information Armstrong would not have approached Thomasville. Although Armstrong's executives had met Thomasville personnel prior to Mr. Samuels' retention, it is clear from the testimony regarding those meetings that they involved nothing more than an attempt by Armstrong to

gauge the market for its own products and to sell such products to Thomasville. Moreover, the last such meeting, in January 1966, was more than eight months before Mr. Samuels advised Armstrong of Thomasville's availability for acquisition. In the intervening period, Armstrong had made no effort whatsoever to approach Thomasville (regarding acquisition or otherwise) and, as their absence from the record establishes, no studies were conducted by Armstrong of Thomasville for acquisition purposes, even though Armstrong had formalized its procedures for pursuing acquisition possibilities by creating an acquisition committee. Yet, less than two months after the Contract was signed, Armstrong officers met with Mr. Finch on October 18, 1966, and broached, for the first time ever, the subject of Armstrong's acquisition of Thomasville.

Nor can it be argued that holding Armstrong to the terms of the Contract is onerous or unfair. This is not a case of an interloper claiming to have brought two companies together. It is a case in which a company sought out and engaged one of the most distinguished men in the acquisition field to help it do what it could not do on its own. The simple fact is that Armstrong needed Mr. Samuels' expertise and the measure of its need is the terms of the Contract. By that standard, it is clear that Armstrong expected to benefit from Mr. Samuels' more than 30 years of experience in substantial acquisitions and mergers and that it agreed to compensate him accordingly.

Since the material facts are undisputed, and the inference from them is compelling, it is respectfully submitted that this Court should reverse the part of the judgment appealed from and direct the entry of judgment in favor of Mr. Samuels in the full amount provided for in the Contract, $4,474,319.52 (three percent of $149,143,984, the "total consideration paid" for Thomasville (Exh. A, at 617)).

2. THE DISTRICT COURT IGNORED CONTRACTUAL PROVISIONS PURSUANT TO WHICH MR. SAMUELS WOULD, IN ANY EVENT, BE ENTITLED TO PARTIAL RECOVERY.

Under paragraph 5 of the Contract, Mr. Samuels became entitled to two-thirds of a full fee upon consummation of an acquisition, although he had nothing to do with finding it, if Armstrong asked him to "explore and negotiate" the acquisition on its behalf. Furthermore, paragraph 8 of the Contract provides for payment of that amount if, "after instructing. . . [him] to negotiate", Armstrong instructed Mr. Samuels to terminate his activities and thereafter consummated the acquisition within 24 months.

Even if, contrary to fact and law, Mr. Samuels had not earned a full fee by advising Armstrong that, in his expert judgment, Thomasville was available for acquisition, there is undisputed testimony that he attempted to explore the acquisition of Thomasville by Armstrong with Mr. Finch. Furthermore, Mr. Samuels' testimony that he was asked by Mr. Donnelly to

pursue Thomasville on Armstrong's behalf is not contradicted by anycredible testimony. Although Mr. Donnelly said that he never asked Mr. Samuels to do anything in connection with Thomasville, and Messrs. Binns and Warnock claimed that they had advised Mr. Samuels prior to his hiring that he was not to have anything to do with Thomasville, that testimony is, as shown at pages 34-37 above, impossible to believe.

In these circumstances, the provisions of paragraph 8 of the Contract are clearly applicable, despite the fact that the District Court paid them no heed, since the Thomasville acquisition was consummated on November 1, 1968, well within 24 months of the January 1967 notice to Mr. Samuels that the Contract was to be terminated. Moreover, even absent such an express provision,

> "The rule is well-established in brokerage cases, and is analogous. . .[in a finder's fee case], that interference with the opportunity of a broker to complete his services does not bar his right to commissions (e.g., Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 383-384; 6 N.Y. Jur., Brokers, §128). The rule is but a species of the more general doctrine that a promisor is not discharged by the nonperformance of a condition precedent or return promise imposed on the promisee but which the promisor prevented or hindered (Sibbald v. Bethlehem Iron Co., supra p. 384; Restatement, Contracts, §295)." Simon v. Electrospace Corp., 28 N.Y. 2d 136, 142 (1971).

Here the evidence is overwhelming that Armstrong's decision to terminate Mr. Samuels' activities in January 1967 was taken purposely to interfere with Mr. Samuels' efforts to meet with Mr. Finch, in response to Mr. Finch's expression

of concern about the involvement of a finder. Therefore, under paragraph 8 of the Contract as well as common law principles, Mr. Samuels is entitled to recovery of at least two-thirds of a full three percent, or $2,932,879.78. Thus, even had Mr. Samuels not earned a full fee under the Contract, the part of the judgment appealed from would, it is respectfully submitted, have to be reversed with a direction for the entry of judgment in that amount.

Point 2

THE DISTRICT COURT'S REFUSAL TO GRANT MR. SAMUELS A TRIAL CONTINUANCE FOR A RELIGIOUS HOLIDAY WAS AN ABUSE OF DISCRETION AND DEPRIVED HIM OF THE OPPORTUNITY TO PRESENT REBUTTAL EVIDENCE GOING TO THE CREDIBILITY OF MESSRS. BINNS AND WARNOCK.

At the end of the second day of trial, October 10, 1973, Mr. Samuels' trial counsel requested a continuance to permit Mr. Samuels to observe a religious holiday on October 11 and October 12, 1973 (the Jewish holiday of Sukkot). The trial transcript is as follows:

> "MR. LESCH: The other thing is, Mr. Samuels is celebrating a religious holiday tomorrow and Friday--
>
> "THE COURT: I can't help that, counsellor. I don't know of anything that precludes his presence here.
>
> "MR. LESCH: He has asked me to make that request of the Court, to adjourn this--
>
> "THE COURT: I don't know that his presence here is necessary.
>
> "MR. LESCH: He would like to be present.

"THE COURT: I am not passing on it at all. If he is present, all right. If he isn't present, all right." (388-389).

The District Court having refused to grant a continuance, the trial proceeded on Thursday, October 11, 1973, to its conclusion. On that day, for the first time, there was testimony about a July 22, 1966 meeting between Mr. Binns and Mr. Samuels in Lancaster. According to Mr. Binns, it was at that meeting that he mentioned Thomasville to Mr. Samuels as one of several companies with which Armstrong already had "things going" and told Mr. Samuels that he was therefore to have nothing to do with it (453). Mr. Binns' testimony was supported by Exhibit 24, his expense account showing a charge for a luncheon, on July 22, 1967, with Mr. Samuels at the Lancaster Country Club. Mr. Warnock, also testifying on October 11, supported Mr. Binns' testimony with his recollection that he had first met Mr. Samuels some time in late July or early August in Lancaster.

Had Mr. Samuels been present, there is no question but that convincing proof that no such meeting could have taken place on July 22 would have been offered.* Ordinarily such testimony would have been important in evaluating Mr. Binns' powers of recall, but here it also would have borne heavily on the question of his credibility, as well as that of Mr. Warnock, because of the fact that Mr. Binns' expense account

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*That such proof existed is clear. Exhibits for identification 22 and 23 establish that Mr. Samuels could not possibly have met Mr. Binns in July 1967.

(Exh. 24, at 615) was obviously incorrect.

Nor was the court's refusal to continue the trial harmless because Mr. Samuels was represented by counsel and had already testified on direct and cross examination on October 9. The record is clear that Michael Lesch, Mr. Samuels' trial counsel, had only recently been assigned to the case, although the action had been in litigation since mid-1969. The transcript of a pretrial conference held on September 10, 1973, just four weeks prior to commencement of the trial, at which Mr. Lesch first made an appearance in the action, shows that he was, at that time, totally unfamiliar with the facts in the case. In response to the District Court's question, "What do you have on proof?", Mr. Lesch was only able to say: "All I can say is what I read in the memorandum coming down here but I understand there is a written commission agreement dated August 25, 1966." (20).

At that same conference, in response to the District Court's invitation to comment on a point made by counsel for Armstrong, Mr. Lesch stated: "I suppose we have a lot to say but as I said to your Honor off the record Mr. Gould who is going to try this case was called on an emergency to Washington, and Mr. Shelton, who knows something about it, couldn't be here." (21). One week later, another pretrial conference was held. At that time, Mr. Lesch informed the court that "[s]ince I first spoke

to you, Mr. Gould assigned this case to me to try". (27).

Thus, the effect of the District Court's refusal to continue the case was that Mr. Samuels, an attorney and member of the Bar of the State of New York, although fully familiar with the facts involved, was unable to assist his recently assigned trial counsel during presentation of the bulk of defendant's case. While the trial transcript shows that Mr. Lesch made an attempt to cross examine Mr. Binns on the question of the supposed meeting on July 22, 1967, it also shows that he stopped short of recalling Mr. Donnelly to authenticate Exhibits for identification 22 and 23, which, if introduced, would have conclusively proven that both Mr. Binns' recollection and expense account were false. Had Mr. Samuels been in attendance, the importance of this documentary evidence would have been clear to him, since Mr. Samuels unquestionably knew, and could have proved, that he was not in Lancaster on July 22.

It would be vain to argue that the District Court could not have anticipated the prejudicial effect to Mr. Samuels in continuing the trial without his presence. It not only knew that Mr. Samuels was an attorney, and therefore likely to be making an important contribution to the trial of the action, but it also knew, because of Mr. Lesch's statements to it during the pretrial conferences, that Mr. Samuels' trial counsel had only recently been assigned to the case and was

likely to require Mr. Samuels' assistance in prosecuting the action. In such circumstances the likelihood of prejudice was obvious. Cf. Smith-Weik Machinery Corp. v. Murdock Machine and Engineering Co., 423 F. 2d 842 (5th Cir. 1970) (considering local counsel's unfamiliarity with the case, the short time asked for a continuance and the complex nature of the action, it was an abuse of discretion to deny a continuance requested because of counsel's illness).

VI. CONCLUSION

For the foregoing reasons, this Court should reverse the portion of the judgment appealed from and direct that judgment be entered for Mr. Samuels in the amount of $4,474,319.52. Alternatively, the portion of the judgment appealed from should be reversed with the direction that (1) judgment be entered in the amount of $2,982,879.78 and a new trial had on the issue of additional damages or (2) a new trial be had.

Respectfully submitted,

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Addendum

Federal Rules of Civil Procedure, Rule 52.

FINDINGS BY THE COURT

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

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